CHAPTER 14

SECURITY ASSISTANCE AND FOREIGN ASSISTANCE

REFERENCES

1. 10 U.S.C. § 166a, CINC's Initiative Funds.
2. 10 U.S.C. § 401, Humanitarian and Civic Assistance (HCA).
3. 10 U.S.C. § 402, Space Available Transportation of Relief Supplies.
4. 10 U.S.C. § 404, Disaster Relief.
5. 10 U.S.C. § 1050, Latin American (LATAM) Conferences.
6. 10 U.S.C. § 1051, Regional Conferences.
7. 10 U.S.C. § 2010, Combined Exercises.
8. 10 U.S.C. § 2011, Special Operations Training.
9. 10 U.S.C. § 2341-50, Acquisition and Cross Servicing Agreements.
10. 10 U.S.C. § 2547, Excess Non-Lethal Supplies.
11. 10 U.S.C. § 2551, Humanitarian Assistance (HA).
12. 22 U.S.C. § 2318, Presidential Drawdowns.
13. 22 U.S.C. § 2347, International Military Education and Training Program (IMET).
14. 22 U.S.C. § 2761, Foreign Military Sales Program (FMS).
15. 22 U.S.C. § 2763, Foreign Military Financing Program (FMFP).
16. 22 U.S.C. § 2770a, Reciprocal Training.
17. 31 U.S.C. § 1301(a), Purpose Statute.
18. Foreign Assistance Act of 1961, 75 Stat. 434, as amended and codified at 22 U.S.C. §§ 2151-2349aa-9 (FAA).
19. Arms Export Control Act of 1976, 90 Stat. 734, as amended and codified at 22 U.S.C. 2751-2796c (AECA).
20. Senate Committee on Foreign Relations & House Committee on Foreign Affairs, Legislation on Foreign Relations Through 2001, vols. I--A and I--B, (Apr 2002) (containing up-to-date printing of the FAA and AECA and reflecting all current amendments, as well as relevant portions of prior year authorization and appropriations acts which remain in effect).
21. Foreign Operations, Export Financing, and Related Programs Appropriations Acts, passed yearly (FOAA).
22. Executive Order No. 11958, Jan. 18, 1977, 42 Fed. Reg. 4311 (assigns Security Assistance responsibilities among the Executive departments).
23. U.S. Department of State, Congressional Presentation Foreign Operations Fiscal Year 2002 (CPD).
24. DoD 5105.38-M, Security Assistance Management Manual (SAMM).
25. Defense Institute of Security Management, The Management of Security Assistance.
26. DoDD 5105.38, Defense Security Assistance Agency (DSAA), 10 August 1978
27. DoDD 5105.47, U.S. Defense Representative (USDR) in Foreign Countries, 20 September 1991
28. AR 12-15 / AFR 50-29 / SECNAVINST 4950.4, Security Assistance and International Logistics: Joint Security Assistance Training (JSAT) Regulation, 28 Feb. 1990 (AR 12-15).
29. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

INTRODUCTION

The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a relatively confusing mesh of statutes, annual appropriations, regulations, directives, messages and policy statements. How do we make sense of all these rules? Is there a logical, relatively simple methodology for analyzing this tangled web of activities, authorities and funding sources? Is there some connection and relationship between the various

legislative authorities and funding sources? We think so. This chapter will attempt to paint the "big picture" of U.S. foreign assistance and then focus on specific areas of the big picture. Specifically, this chapter will:

Describe the legal framework for the provision of foreign assistance by the U.S. State Department and Defense Department.

Depict the State Department Security Assistance programs designed to strengthen friendly foreign militaries, including the U.S. military's significant role in these programs.

Illustrate the Defense Department military cooperative programs that supplement and support the goals of the security assistance programs of the State Department.

Very briefly describe a few of the State Department Development Assistance programs aimed at improving the socio-economic foundations of friendly foreign nations, including the U.S. military's extremely limited role in these programs.

Summarize the Defense Department humanitarian programs intended to complement the development assistance programs of the State Department.

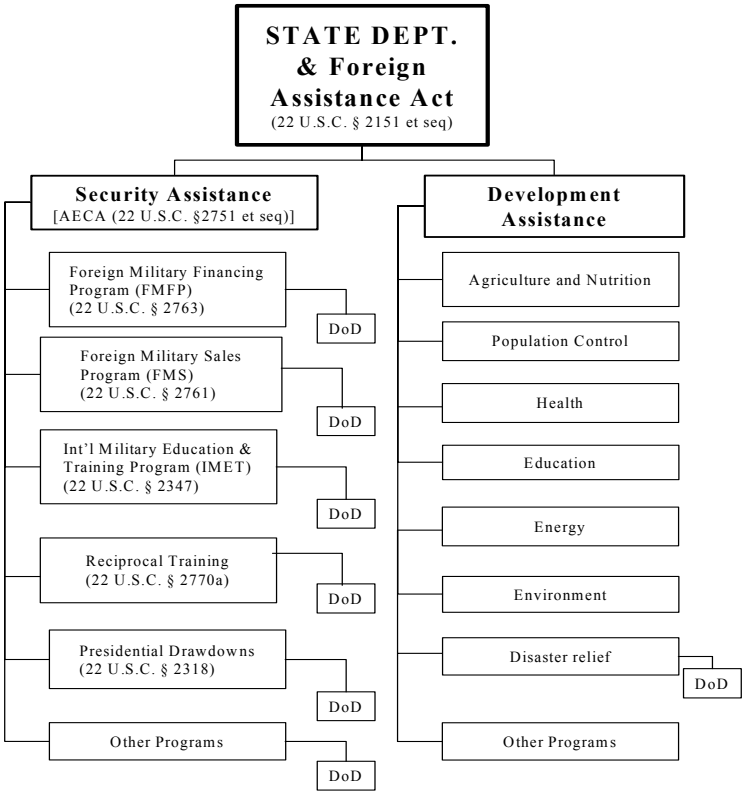
Throughout the chapter, we will spotlight areas where Judge Advocates should pay special attention. The issue usually boils down to deciding whether State Department authority (under Title 22 of the U.S. Code) and money, or Defense Department authority (under Title 10 of the U.S. Code) and money should be used to accomplish a particular objective. This sophisticated task often consumes a great amount of time and effort from an operational lawyer at all levels of command. Understanding the individual components of the State Department's and Defense Department's foreign assistance programs is very important, but a relatively simple matter. The real challenge is to learn how the various programs interrelate with each other. This is where the Judge Advocate earns credibility with the commander. By understanding the complex relationships between the various authorities and funding sources, the Judge Advocate is better equipped to provide the commander with advice that can mean the difference between accomplishing the desired objective legally, accomplishing it with unnecessary legal and political risk, or not accomplishing it at all.

LEGAL FRAMEWORK FOR THE PROVISION OF FOREIGN ASSISTANCE BY THE US GOVERNMENT

The Foreign Assistance Act

A landmark legislation that provided a key blueprint for this grand strategy of engagement with friendly nations was the Foreign Assistance Act of 1961 (FAA).[1] The FAA intended to support friendly foreign nations against communism on twin pillars: 1) provide supplies, training, and equipment to friendly foreign militaries, and 2) provide education, nutrition, agriculture, family planning, health care, environment, and other programs designed to alleviate the root causes of internal political unrest and poverty faced by the masses of many developing nations. The first pillar is commonly referred to as "security assistance" and is embodied in Part II of the FAA. The second pillar is generally known as "development assistance" and it is found in Part I of the FAA.

[1] 22 U.S.C. §§ 2151 et seq.



The FAA charged the State Department with the responsibility to provide policy guidance and supervision for the programs created by the FAA. Each year, Congress appropriates a specific amount of money to be used by agencies subordinate to the State Department to execute the FAA programs.[2]

Even though Congress charged the State Department with the primary responsibility for the FAA programs, the U.S. military plays a very important and substantial supporting role in the execution of the FAA's first pillar, Security Assistance. The small DoD boxes attached to the primary Security Assistance programs in the above diagram represent this relationship. The U.S. military provides most of the training, education, supplies and equipment to friendly foreign militaries under Security Assistance authority. The State Department retains ultimate strategic policy responsibility and funding authority for the program, but the "subcontractor" that actually performs the work is often the U.S. military.

With regard to the second pillar of the FAA, Development Assistance, the U.S. Agency for International Development (USAID), the Office for Foreign Disaster Assistance (OFDA) within the Department of State, and embassies, often call on the U.S. military to assist with disaster relief and other humanitarian activities. Again, the legal authority to conduct these programs emanate from the FAA, the funding flows from the State Department's annual Foreign Operations Appropriations, and the policy supervision also rests with the State Department. But as represented by the above diagram, the U.S. military plays a relatively small role in the State Department Development Assistance programs.

The enactment of the FAA in 1961, which clearly empowered the State Department to serve as the principal U.S. agent for foreign assistance, did not cause the U.S. military to cease performing its traditional operations and activities that benefited foreign militaries and civilian populations. In fact, the Vietnam War, Arab – Israeli wars,

[2] Annual Foreign Operations Appropriations Acts.

and an escalation of communist insurgencies throughout Asia, Africa, and Latin America caused an expansion of direct U.S. military assistance to foreign militaries and to civilian populations in developing nations. The U.S. military viewed these activities as a cost-effective means to contain communism, and the containment of communism was a legitimate national security goal of the U.S. military. After all, if communism could not be contained by bolstering foreign militaries and making it harder for the communists to foment insurgencies within the civilian population, then the U.S. military might ultimately have to engage in combat on the borders and shores of the United States. Friendly countries had to become more militarily self-reliant and socially stable.

In light of the fact that the U.S. military viewed its own traditional foreign assistance role as a national security matter, it felt that use of its operations and maintenance funds for this purpose was very appropriate and within the purpose for which Congress provided those funds.

U.S. Fiscal Law and The 1984 GAO Honduras Opinion

In the early 1980s the U.S. government tasked the U.S. military to provide assistance to the Nicaraguan "contra" rebels that where committed to the overthrow of the Sandanista/communist government in Nicaragua. To provide this assistance, the U.S. military began support and training operations for the Nicaraguan contras from Soto Cano Airbase in neighboring Honduras.

In addition to the assistance provided to the "contras," the U.S. military conducted joint combined exercises with the Honduran armed forces. Prior to these exercises and during the exercises themselves, the U.S. Army provided military training to Honduran armed forces and conducted a wide range of civic and humanitarian assistance to the Honduran rural villagers located near the exercise sites. Both of these activities were funded using Department of Defense (DoD) Operations and Maintenance (O&M) funds. These O&M funds were made available by Congress to the military for the general "operation and maintenance" of the military, including the conduct of exercises.

In 1984 the U.S. Congress tasked the U.S. General Accounting Office (GAO) to investigate the U.S. military's activities at Soto Cano Airbase in Honduras. Specifically, Congress asked GAO to provide a legal decision "regarding the propriety of funding methods used by the Department of Defense in its recent joint combined exercises in Honduras." GAO concluded that:[3]

1. "Costs pertaining to the training of Honduran armed forces during, or in preparation for, the … exercise should have been financed as security assistance to Honduras. Use of [Defense Department] O&M funds for such activities was unauthorized."; and

2. "DoD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as AID) … or (for minor projects) as incidental to the provision of security assistance. Such activities conducted in Honduras during the course of … [the exercise] were improperly charged to DoD's O&M appropriations."

GAO's basis for the above conclusions results from its application of the Purpose Statute.[4] Simply put, Congress specifically authorized and funded the State Department to conduct Security Assistance and Development Assistance. The Defense Department, on the other hand, received congressional authorization and operation and maintenance funds to provide for national defense. Since the authority and funding provided to State Department were specific in nature concerning security assistance and the development assistance, GAO concluded that the Defense Department was prohibited from expending its general O&M funds to perform similar kinds of activities. In short, if Congress had intended to spend more money on these kinds of activities and programs, it would have appropriated funds to the State Department for that fiscal year. The U.S. military's use of Defense Department O&M funds to do the same kind of work resulted in the augmentation of the State Department's budget, contrary to Congressional intent.

[3] GAO also made conclusions regarding the use of O&M funds for military construction projects which are not relevant to the discussion in this chapter.

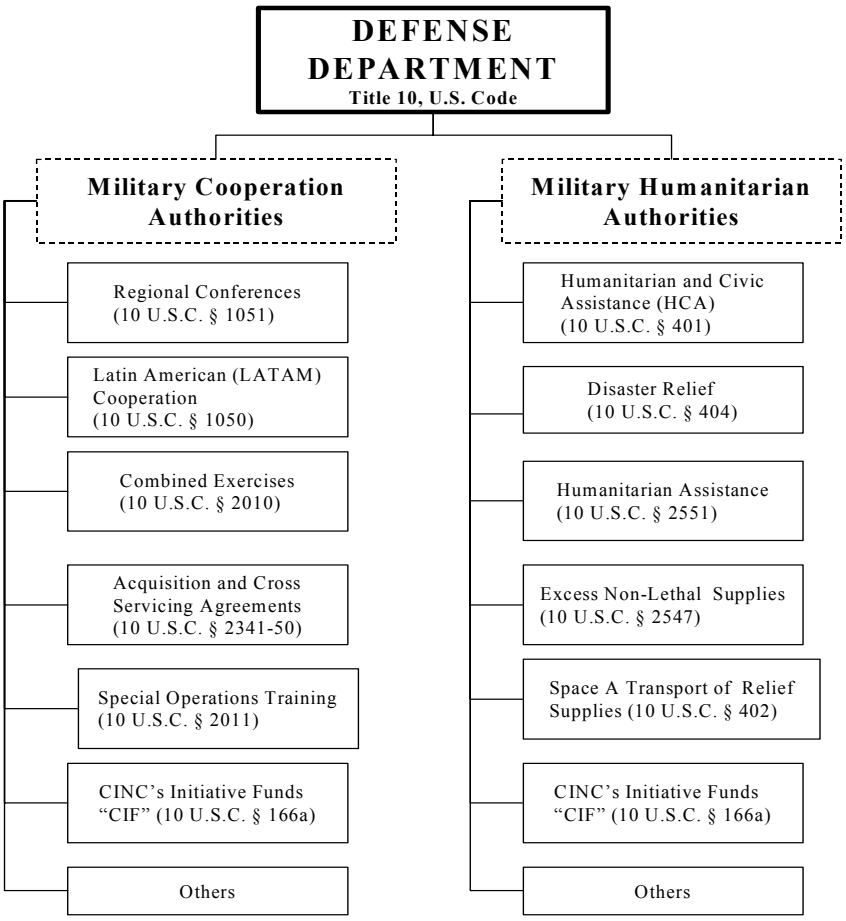
[4] 31 U.S.C. Sec 1301(a). See discussion in the chapter entitled *Fiscal Law* concerning this statute.

Following this analysis, the GAO determined that

> expenses for training Honduran forces, and for the provision of civic and humanitarian assistance, have been charged to DoD's O&M funds in violation of [The Purpose Statute,] 31 U.S.C. sec 1301(a). Although 31 U.S.C. sec 1301(a) does not specify the consequences (or remedies) for its violation, it is clear that such an expenditure is subject to disallowance by this Office. … In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources (i.e., security assistance funds for training of Honduran forces, foreign aid funds for civic/humanitarian assistance activities).

GAO's remedy required the State Department to reimburse the Defense Department's O&M accounts for money spent by the Defense Department to perform activities that should have been paid for from State Department funds.

GAO concluded its opinion by "recommending to DoD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M funded exercise." DoD wasted no time in acting on GAO's recommendation. Within a few years following the 1984 Honduras Opinion, DoD sought and obtained several legislative authorizations permitting the use of DoD O&M funds to conduct limited operations and activities that benefit foreign nations. These operations and activities are very similar to those conducted by State Department agencies pursuant to the FAA. The key to these DoD authorized activities is that they must complement, supplement, and support the primary FAA programs, but should not, duplicate, or frustrate the FAA programs. The following diagram demonstrates some of the principal DoD legislative authorities that permit the U.S. military to conduct operations that complement State Department's



Security Assistance and Development Assistance programs.

To ensure that the DoD operations and activities complement but do not duplicate or frustrate State Department foreign assistance and development assistance programs, the DoD authorizing legislation usually:

1. Limits the funding levels to relatively small amounts;

2. Requires coordination and approval by the State Department and U.S. embassy in the target nation; and

3. Requires reporting of activities to Congress.

The preceding discussion sets the stage for a more detailed analysis of four major groups of programs and authorities: 1) State Department's Security Assistance programs; 2) the Defense Department's Military Cooperative programs; and 3) State Department's Development Assistance programs; and 4) the Defense Department's humanitarian programs. We begin with a look at security assistance.

SECURITY ASSISTANCE

This section will discuss in some detail the State Department's Security Assistance program, and the U.S. military's significant supporting role in this program. It will also highlight common legal issues that arise during the course of conducting security assistance activities.

State Department's Security Assistance Programs Under the FAA.

The DoD Dictionary of Military and Related Terms, Joint Publication 1-02, defines Security Assistance as "Groups of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act (AECA) of 1976,[5] as amended, and other related statutes by which the United States provides defense articles, military training, and other defense related services, by grant, loan, credit or cash sales in furtherance of national policies and objectives." The Policy of the program is threefold:

Promote peace and security through effective self-help and mutual aid.

Improve the ability of friendly countries and international organizations to deter, and defeat, aggression.

Create an environment of security and stability in developing countries.

For the sake of discussion, we have organized the State Department's Security Assistance programs into three categories: appropriated programs, non-appropriated programs, and special programs.

Appropriated Programs.

These are programs for which Congress appropriates money in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act.

Foreign Military Financing Program (FMFP).

Concept. Eligible governments or international organizations receive Congressionally appropriated grants and loans to help them purchase U.S. defense articles, services, or training (or design and construction services) through Foreign Military Sales (FMS)/Foreign Military Construction (FMC) or Direct Commercial Sales (DCS) channels. Statutory Authority. AECA §§ 23-24 (22 U.S.C. §§ 2763-64). Governing

[5] 22 U.S.C. §§ 2751 et seq.. The purpose of the AECA was to consolidate and revise foreign relations legislation related to reimbursable military support. It is the statutory basis for the conduct of Foreign Military Sales and Foreign Military Construction Sales, and establishes certain export licensing controls on Direct Commercial Sales of defense articles and services.

Regulations. Security Assistance Management Manual (SAMM) (DoD 5105.38-M). Administering Agency. DoD, with provisions for consultation with DoS and Department of Treasury.

International Military Education and Training (IMET) Program.

Concept. Provide training to foreign military personnel in the United States, in overseas U.S. military facilities, and in participating countries on a grant basis. The "Expanded IMET Program" focuses on civilian control of the military, military justice systems, codes of conduct, and protection of human rights, and permits training of influential non-Ministry of Defense civilian personnel. Statutory Authority. FAA §§ 541-45 (22 U.S.C. §§ 2347-47d). Governing Regulations. AR 12-15; SAMM, at ch. 10. Administering Agency. DoD. The Defense Security Cooperation Agency (DSCA) has overall responsibility within DoD for implementing IMET. The Defense Institute for International Studies (DIILS), located at the Naval Justice School, coordinates IMET.

Economic Support Fund (ESF).

Concept. In special economic, political or security circumstances, make loans or grants to eligible foreign countries for a variety of economic purposes, including balance of payments support, infrastructure and other capital and technical assistance development projects, and health, education, agriculture, and family planning. Statutory Authority. FAA §§ 531-35 (22 U.S.C. §§ 2346-46d). Administering Agency. Department of State, to be exercised in cooperation with the Director of the United States International Development Cooperation Agency and USAID.

Peacekeeping Operations (PKO).

Concept. Provide funds for the Multinational Force and Observers (MFO) implementing the 1979 Egyptian-Israeli peace treaty, for the U.S. contribution to the United Nations Force in Cyprus (UNFICYP), and for other international peace enforcement and peacekeeping operations. Statutory Authority. FAA §§ 551-53 (22 U.S.C. §§ 2348-48c). Administering Agency. Department of State.

Non-proliferation, Antiterrorism, Demining, and Related Programs (NADR).

Concept. Captures several related programs in a single account, to include:

Non-proliferation and disarmament fund, which is designed to halt the proliferation of nuclear, biological, and chemical weapons; destroy or neutralize existing weapons of mass destruction; and limit the spread of advanced conventional weapons. 22 U.S.C. §§ 5851-61, codifying the Freedom for Russia and Emerging Eurasian Democracies and Open Markets [FREEDOM] Support Act of 1992, Pub. L. No. 102-511, §§ 501-511, 106 Stat. 3320 (1992).

International Atomic Energy Agency support. The IAEA is primarily responsible for overseeing safeguard agreements concluded under the Non-Proliferation Treaty of 1968. FAA § 301 (22 U.S.C. § 2221).

Korean Peninsula Energy Development Organization (KEDO), which was established in 1994 to arrange for financing and construction of light water nuclear reactors for North Korea, with the shipment of fuel oil in the interim, in exchange for North Korea's dismantling of its nuclear weapons program. FAA § 301 (22 U.S.C. § 2221).

Anti-Terrorism Assistance, which provides specialized training to foreign governments to help increase their capability and readiness to deal with terrorists and terrorist incidents. FAA § 571-(22 U.S.C. § 2349aa).

Global Humanitarian Demining, which provides funds that are devoted to identifying and clearing land mines. AECA § 23 (22 U.S.C. § 2763).

Administering Agency. Department of State.

Non-appropriated Programs.

These programs authorize certain activities, but do not require Congressional funding, so there is no need for annual appropriations for implementation.

Foreign Military Sales (FMS) Program and Foreign Military Construction (FMC) Program.

Concept. Eligible recipient governments or international organizations purchase defense articles, services, or training (or design and construction services), often using grants provided under the Foreign Military Financing program discussed above, from the United States government on the basis of formal contracts or agreements (normally documented on a Letter of Offer and Acceptance (LOA) and managed by DoD as "cases"). The articles or services come either from DoD stocks or new procurements under DoD-managed contracts. FMS cases must be managed at no cost to the U.S. Government. Recipient countries are charged an administrative surcharge to pay for the costs of administering the program, including most personnel costs. Statutory Authority. AECA §§ 2122 (22 U.S.C. §§ 2761-62) (authorizing FMS); AECA § 29 (22 U.S.C. § 2769) (authorizing FMC). Governing Regulations. SAMM. Administering Agency. Department of Defense (DoD).

Direct Commercial Sales (DCS)

Concept. Eligible governments or international organizations purchase defense articles or services under a Department of State-issued license directly from U.S. industry, often using grants provided under the Foreign Military Financing program discussed above. No management of the sale by DoD occurs (unlike FMS). Statutory Authority. AECA § 38 (22 U.S.C. § 2778). Governing Regulations. 22 C.F.R. §§ 120-30 (comprising chapter entitled "International Traffic in Arms Regulations (ITAR)). The SAMM, at 202-6 - 202-14, includes a reprint of the United States Munitions List (USML). The USML is a list containing items considered "defense articles" and "defense services" pursuant to AECA §§ 38 and 47(7) which are therefore strictly controlled. Administering Agency. Departments of State, Commerce, Treasury.

Reciprocal Training, 22 U.S.C. § 2770a.

When conducted in accordance with a bilateral international agreement, U.S. military units may train and support foreign units (e.g., at combat training centers) provided that the foreign country reciprocates with equivalent value training within one year. If the foreign country has not reciprocated, they are expected to pay for the value of the training received.

Excess Defense Articles (EDA) Provisions.

General. EDA are essentially defense articles no longer needed by the U.S. armed forces. There is a general preference to provide EDA to friendly countries whenever possible rather than having them procure new items. Only countries that are justified in the annual Congressional Presentation Document by the Department of State or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires 15 days notice prior to issuance of a letter of offer if the USG sells EDA. However, most EDA is transferred on a grant basis. No DoD procurement funds may be expended in connection with an EDA transfer. The transfer of these items must not adversely impact U.S. military readiness. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items original value. The sale/grant of EDA must include an agreement for the recipient country to pay the costs of packing, crating, handling, and transportation (PCH&T). On an exceptional basis, the President may provide transportation (on a space available basis), in accordance with FAA § 516(e) (22 U.S.C. § 2321j(e)). Finally, the annual value of EDA is limited to $350 million of the articles' current value. FAA § 516(g)(1) (22 U.S.C. § 2321j(g)(1)). Governing Regulations. SAMM, chapter 11. Administering Agency. The State Department writes the appropriate presidential determination. After signature by the President, DoD administers the drawdown, up to the specified dollar value.

Presidential Emergency Drawdown Authorities.

Military Emergencies: FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1)). The President may draw down defense articles, defense services, and military education and training if an unforeseen emergency arises that requires immediate military assistance that cannot be met under any other section. The authority is limited to $100 million per fiscal year.

Other Emergencies: FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2)). If the President determines that it is in the United States' national interest to drawdown to support counternarcotics, disaster relief, or refugee and migration assistance, he may draw down article and services from the inventory and resources of any agency of the U.S. and military education and training from DoD. Certain restrictions apply. The aggregate value of articles, services, and military education and training cannot exceed $150 million in any fiscal year. Not more than $75 million may be provided from the inventory and resources of DoD. Not more than $75 million may be provided for international narcotics control assistance. Not more than $15 million may be provided to support DoD-sponsored humanitarian projects associated with POW/MIA recovery operations in Vietnam, Cambodia, and Laos.

Peacekeeping Emergencies: FAA § 552(c) (22 U.S.C. § 2348a(c)). With respect to peacekeeping operations, the President has emergency authority to transfer funds if he determines that, as the result of an unforeseen emergency, it is in our national interests to provide assistance. He may also direct the drawdown of commodities and services from the inventory and resources of any U.S. Government agency of an aggregate value not to exceed $25 million in any fiscal year.

The Military's Role in Security Assistance.

Although the State Department retains responsibility for the supervision of all Security Assistance programs and actually administers certain programs, DoD has the greatest involvement in Security Assistance of any department within the Executive Branch. DoD expends approximately 20,000 man-years per year on Security Assistance. Among the agencies within DoD which participate in providing Security Assistance are:

- Defense Security Cooperation Agency (DSCA). DSCA was created by DoD Directive 5105.38 as a separate defense agency under the direction, authority, and control of the Assistant Secretary of Defense (International Security Affairs). Among other duties, DSCA is responsible for administering and supervising DoD security assistance planning and programs.

- Defense Institute of Security Assistance Management (DISAM). DISAM is a schoolhouse operating under the guidance and direction of the Director, DSCA. According to DoD Directive 2140.5, the mission of DISAM is as follows: "The DISAM shall be a centralized DoD activity for the education and training of authorized U.S. and foreign personnel engaged in security assistance activities." In addition to resident courses, DISAM prepares a valuable publication entitled "The Management of Security Assistance," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, OH.

- The Military Departments.

  - Secretaries of the Military Departments. Advise the Secretary of Defense on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

  - Department of the Army. Consolidates its plans and policy functions under the Deputy Undersecretary of the Army (International Affairs). Operational aspects are assigned to Army Material Command. The executive agent is the U.S. Army Security Assistance Command.

  - Department of the Navy. The principal organization is the Navy International Programs Office (Navy IPO). Detailed management occurs at the systems commands located in the Washington, D.C. area and the Naval Education and Training Security Assistance Field Activity in Pensacola, Florida.

- Department of the Air Force. Office of the Secretary of the Air Force, Deputy Under Secretary for International Affairs (SAF/IA) performs central management and oversight functions. The Air Force Security Assistance Center oversees applicable FMS cases, while the Air Force Security Assistance Training Group (part of the Air Education Training Group) manages training cases.

- Security Assistance Organizations (SAOs). The term encompasses all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance management functions. It includes military missions, military groups, offices of defense cooperation, liaison groups, and designated defense attaché personnel. The primary functions of the SAO are logistics management, fiscal management, and contract administration of country security assistance programs. The Chief of the SAO answers to the Ambassador, the Commander of the Unified Command (who is the senior rater for efficiency and performance reports), and the Director, DSCA. The SAO should not be confused with the Defense Attachés who report to the Defense Intelligence Agency.

Prohibitions and Potential Legal Issues.

General.

Congress appropriates funds for Security Assistance in its annual Foreign Operations, Export Financing, and Related Programs Appropriations Act. Security Assistance funds are often referred to as "Title 22 money" after the authorizing U.S. Code provisions. DoD receives its money under a separate appropriation ("Title 10 money"). General principles of fiscal law restrict the expenditure of funds to the purpose for which those funds were appropriated. **Critical for judge advocates to remember: activities, programs and operations which are essentially Security Assistance, and which should therefore be funded with State Department Title 22 money, may not be funded with Defense Department Title 10 money.**

Unauthorized Training of Foreign Personnel.

Congressional Purpose. Training of foreign military forces should occur through the IMET, an FMS case, or some other specifically authorized program. Security Assistance programs that furnish training must not be supported by appropriations intended to be used for the operation and maintenance (O&M) of United States forces. (Remember the 1986 GAO Honduras opinions.) The law defines "training" very broadly: "[T]raining includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces." AECA § 47(5) (22 U.S.C. § 2794(5). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though "training exercises" is omitted.

Not all activity that appears to be training of foreign personnel is considered to be security assistance training. Providing foreign armed forces with **interoperability, safety, and familiarization information** is not security assistance training. "[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations*." The Honorable Bill Alexander, House of Representatives*, B-213137, Jan. 30, 1986 (unpublished GAO opinion). Additionally, if **the primary purpose of the exercise or activity is to train U.S. troops**, then the activity is not considered to be security assistance training of foreign forces. "In our view, a U.S. military training exercise does not constitute "security assistance: as long as (1) the benefit to the host government is incidental and minor and is not comparable to that ordinarily provided as security assistance and (2) the clear primary purpose of the exercise is to train U.S. troops*." Gen. Fred F. Woerner*, B-230214, Oct. 27, 1988.

The FAA also contains special prohibitions concerning the training of **foreign police**. No FAA funds "shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad." FAA § 660(a) (22 U.S.C. § 2420(a)). FAA § 660(b) exempts from the general prohibition:

(a) "assistance, including training, relating to sanction monitoring and enforcement," and

(b) "assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy."

The general prohibition also does not apply to longtime democracies with no standing armed forces and with good human rights records.

Unauthorized Defense Services of a Combatant Nature.

"Personnel performing defense services sold under this chapter may not perform any duties of a combatant nature, including any duties related to training and advising that may engage United States personnel in combat activities, outside the United States in connection with the performance of those defense services." AECA § 21(c)(1) (22 U.S.C. §2761(c)(1)).

Eligibility Problems With the Foreign Country.

Expropriation of Property Owned by U.S. Citizens. FAA § 620(e)(1) (22 U.S.C. § 2370(e)(1)).

Involvement in Nuclear Transactions. FAA § 669-70 (22 U.S.C. § 2429-29a).

In Arrears on Debts. FAA § 620(q) (22 U.S.C. § 2370(q)).

Support to prevent International Terrorism. FAA § 620A (22 U.S.C. § 2371) and AECA § 40 (22 U.S.C. § 2780).

Transfer, Failing to Secure, or Use of Defense Articles, Services, or Training for Unintended Purposes. FAA § 505 (22 U.S.C. § 2314).

Has by military coup or decree deposed its duly elected Head of Government. FOAA 00, § 508.

Congress requires special notification to Congress before obligating funds for Colombia, Haiti, Liberia, Pakistan, Panama, Peru, Serbia, Sudan, or the Democratic Republic of the Congo. FOAA 00, § 520.

Haiti. Congress limited assistance to Haiti until the Secretary of State certifies that Haiti is conducting thorough investigations into extra-judicial killings and taken action to remove from the National Police those individuals credibly alleged to engage in gross human rights violations. The limitation does not prohibit providing humanitarian, electoral, counter-narcotics, or law enforcement assistance. FOAA 00, §559.

Weapons-Specific Prohibitions.

Tank Ammunition. Sales of depleted uranium tank rounds are limited to countries that are NATO members, Taiwan, and countries designated as a major non-NATO ally. FAA, § 620G (22 U.S.C. § 2378a).

Stingers. Congress continued the annual provision prohibiting making available Stingers to any country bordering the Persian Gulf (Iraq, Iran, Kuwait, Saudi Arabia, Qatar, United Arab Emirates, and Oman), except Bahrain. Bahrain may buy Stingers on a one-for-one replacement basis. FOAA 00 § 530.

For the restrictions on the transfer of white phosphorus munitions, napalm, and RCA, see SAMM, at 203-3.

Summary of Security Assistance.

The key point to remember about Security Assistance is that the State Department provides the overall policy guidance even though U.S. military agencies administer many of the individual programs. Security assistance is a foreign policy tool employed by the Administration and Congress, and thus programs, funding, and eligible recipients will frequently change as political realities change. Security Assistance must be funded with State Department's Annual Foreign Operations Funds, commonly referred to as Title 22 money. Finally, despite the large role that the U.S. military plays in administering the various programs, the Defense Department's Title 10 money may not be used to fund these security assistance programs.

DEFENSE DEPARTMENT'S MILITARY COOPERATIVE PROGRAMS

In addition to its substantial support role in the administration of Security Assistance programs, the U.S. military executes several cooperative programs funded with Title 10 Defense Department O&M money. The majority of these cooperative programs are statutorily based. The programs are organized into three categories: training foreign forces, logistic support to foreign forces, and contacts and cooperation with foreign militaries.

Training Foreign Forces

Special Operations Forces, 10 U.S.C. § 2011. Provided that the training primarily benefits U.S. special operations forces, SOF may train, and train with, friendly foreign forces. U.S. forces may pay incremental expenses incurred by friendly developing countries as the direct result of such training. U.S. Special Operations Command has interpreted this authority to mean that the training must occur overseas.

CINC Initiative Funds, 10 U.S.C. § 166a. The Chairman, JCS, provides funds to Combatant Commanders for a wide variety of purposes, including military education and training of foreign forces. No more than $2 million may be expended for this training per fiscal year worldwide. This fund, referred to as CIF money, operates essentially as a contingency fund that permits the CINC to pay for initiatives. The CIF money provides the CINC with flexibility to cover expenses which, for one reason or another, cannot be covered by the designated pot of money.

Logistics Support for Foreign Militaries

Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341–2350. DoD authority to acquire logistic support without resort to commercial contracting procedures and to transfer support to foreign militaries outside of the AECA. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. Foreign militaries often prefer this method of obtaining logistical support because they do not have to pay the administrative fees associated with sales under the Foreign Military Sales program, and it is quicker and often more flexible.

The present Acquisition and Cross-Servicing (ACSA) authorities have their origins in the North Atlantic Treaty Organization (NATO) Mutual Support Act of 1979 (NMSA), which was originally enacted on 4 August 1980 (P.L. 96-323). Before passage of this legislation, U.S. forces acquired and transferred logistic support through highly formalized means. Logistic support, supplies and services were acquired from foreign governments through commercial contracting methods and application of U.S. domestic procurement laws and regulations (i.e., offshore procurement agreements). Allied requests for logistic support from U.S. forces could only be processed as Foreign Military Sales (FMS) cases under the Arms Export Control Act (AECA). Reductions in the numbers of U.S. logistics forces stationed in the European theater caused greater reliance on host nation support. Allied government sovereignty concerns resulted in refusal to accept U.S. commercial contracting methods. Application of FMS procedures to allied requests for routine logistic support caused additional friction. Finally, DoD turned to Congress for legislative relief.

Through passage of the NMSA, Congress granted DoD a special, simplified authority to acquire logistic support, supplies, and services without the need to resort to traditional commercial contracting procedures. In

addition, the NMSA also authorized DoD, after consultation with the State Department, to enter into cross-servicing agreements with our NATO allies and with NATO subsidiary body organizations for the reciprocal provision of logistic support. In so doing, Congress granted DoD a second acquisition authority as well as the authority to transfer logistic support outside of AECA channels.

Military Contact and Cooperative Authorities

Bilateral or Regional Conference, Seminar or Meeting, 10 U.S.C. § 1051. CINCs may pay for the "travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with the attendance of such personnel at a bilateral or regional … meeting." To qualify, the meeting must take place within the area of responsibility of the unified combatant command in which the traveler's country is located, or in the United States or Canada if sponsored by a U.S.-based CINC.

Latin American Cooperation, 10 U.S.C. § 1050. The Secretary of a Department may use these funds to pay for the "travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses that the Secretary considers necessary for Latin American Cooperation." These funds are held by the service secretaries and then allocated to various commands and offices by service channels, not by Joint channels. Some commands and offices within each service have published regulations concerning the expenditure of these funds, others have not. Thus the guidance varies between the services and within each service. Due to extremely limited guidance contained in the statute, and the variance of regulatory instruction, this is an area which requires careful review and consideration by Judge Advocates. Often, analysis by analogy is the only available course of action. In other words, in the absence of a regulation that is on point, the Judge Advocate should rely on a regulation covering a similar type of expenditure. For example, the Judge Advocate may wish to adhere to the rules contained in the Joint Travel Regulation for guidance on what the rule should be concerning an expenditure for a Latin American traveler.

Combined Exercises, 10 U.S.C. § 2010. The Secretary of Defense, through the CINCs, "may pay the incremental expenses of a developing country that are incurred by that country as the direct result of participation in a bilateral or multilateral military exercise." Incremental expense means the reasonable cost of goods and services consumed by the developing country as a direct result of participating in the exercise with the U.S.. It includes costs for rations, fuel, training ammunition, and transportation. It does "not include pay, allowances, and other normal costs of such country's personnel."

Military-to-Military Contacts and Comparable Activities, 10 U.S.C. § 168. This statute authorizes the Secretary of Defense, usually through the CINCs, "to conduct military-to-military contacts and comparable activities that are designed to encourage a democratic orientation of defense establishments and military forces of other countries." Examples of the activities specifically listed in the law for which funds may be expended include the activities of "contact" teams; military liaison teams; exchanges of civilian or military personnel between defense establishments and units; and costs of seminars, conferences and publications. These contacts would normally be initiated by CINC's of unified commands based on needs in their AOR.

CINC Initiative Fund, 10 U.S.C. § 166a. As stated above, the Chairman, JCS, provides funds to Combatant Commanders for a wide variety of purposes, including the payment of costs for foreign forces to participate in bilateral, regional, and multilateral conferences, meetings and exercises. This statute provides the CINC with authority to spend money specifically set aside to cover unprogrammed contingencies and initiatives. It works sort of as an emergency contingency fund that pays for expenses not otherwise payable (usually for budgetary reasons, not authority reasons) from other budgets.

STATE DEPARTMENT'S DEVELOPMENT ASSISTANCE PROGRAMS

This section will provide a very brief description of the State Department's Developmental Assistance programs, and the U.S. military's relatively minor and infrequent role in these programs, particularly, in the provision of Foreign Disaster Relief.

General

The State Department supervises and conducts a large number of activities authorized by Part I of the FAA designed to strengthen the socio-economic well being of the civilian population. There are too many activities to list them all, but a partial list of the primary programs will provide the reader with a flavor for the wide range of objectives envisioned by this legislation. The activities under the Development Assistance program include, but are not limited to:

Agriculture	Trade credit	Overseas Private Investment Corp.
Rural development	Endangered species	Disadvantaged children in Asia
Nutrition	Shale development	Famine prevention
Population control & health	Tropical forests	Disaster Assistance
Education	Human rights	International Narcotics Control
Energy	Housing guarantees	Loan guarantees

Cooperatives

Central America Democracy, Peace & Development

Integration of women into the economy

Protection of the environment & natural resources

Economic & Democratic Development for the Independent States of the Former Soviet Union

The military's role in the provision of development assistance through the FAA is relatively limited when compared to its role in the provision of security assistance. Nevertheless, from time to time, agencies charged with the primary responsibility to carry out activities under this authority, call upon the U.S. military to render assistance. An example of participation by the U.S. military would be action taken in response to a request for disaster assistance from the Office for Foreign Disaster Assistance (OFDA). OFDA often asks the U.S. military for help in responding to natural and man-made disasters overseas. Key point: generally, costs incurred by the U.S. military pursuant to performing missions requested by other federal agencies under the FAA, Development Assistance provisions, must be reimbursed to the military pursuant to FAA § 632 or pursuant to an order under the Economy Act.

Foreign Disaster Relief In Support of OFDA

The United States has a long and distinguished history of aiding other nations suffering from natural or manmade disasters. In fact, the very first appropriation to assist a foreign government was for disaster relief.[6] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[7] For foreign disaster assistance, Congress granted the President fiscal authority to furnish relief aid to any country "on such terms and conditions as he may determine."[8] The President's primary implementing tool in carrying out this mandate is USAID.

The USAID is the primary response agency for the U.S. Government to any international disaster.[9] Given this fact, DoD traditionally has possessed limited authority to engage in disaster assistance support. In the realm of Foreign Disaster Assistance, the primary source of funds should be the International Disaster Assistance Funds.[10] The Administrator of the USAID controls these funds because the President has designated that person as

[6] This appropriation was for $50,000 to aid Venezuelan earthquake victims in 1812. Over 25,000 people died in that tragedy. Act of 8 May 1812, 12th Cong., 1st Sess., ch. 79, 2 Stat. 730.

[7] Congressional policy is espoused in 22 U.S.C. § 2292(a) as follows:

> The Congress, recognizing that prompt United States assistance to alleviate human suffering caused by natural and manmade disasters is an important expression of the humanitarian concern and tradition of the people of the United States, affirms the willingness of the United States to provide assistance for the relief, and rehabilitation of people and countries affected by such disasters.

[8] 22 U.S.C. § 2292(b).

[9] E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[10] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

the Special Coordinator for International Disaster Assistance.[11] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[12] Normally these funds support NGO and PVO efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military possess unique skills and equipment to accomplish the needed assistance. In these situations, the State Department, through OFDA, may ask for DoD assistance. Funding in these cases comes from the International Disaster Assistance fund controlled by OFDA. DoD is supposed to receive full reimbursement from OFDA when they make such a request. DoD access to these funds to perform Disaster Assistance missions occurs pursuant to § 632 FAA.

Natural or manmade disasters have increasingly become the basis for military operations. The object of foreign disaster relief operations is to provide sufficient food, water, clothing, shelter, medical care, and other life support to victims of natural and man-made disasters. To accomplish this objective, the military may be tasked to establish a secure operational environment and begin to support PVO/NGO supply, medical, and transportation systems. Recent examples of such operations include SEA ANGEL in Bangladesh, SUPPORT HOPE in Rwanda, RESTORE HOPE in Somalia, PROVIDE COMFORT in Northern Iraq, and STRONG SUPPORT in response to Hurricane Mitch in Central America.[13] In addition, foreign disaster relief operations may coexist with other operations, and arise in unexpected contexts. For example, in September 1994, the U.S. Ambassador to Haiti declared that the "corruption and repression in the *de facto* regime" had caused a man-made state of disaster in that country. The declaration opened the door for additional relief, rehabilitation, and reconstruction assistance (and funds) for Haiti.

DEFENSE DEPARTMENT'S MILITARY HUMANITARIAN PROGRAMS

Following the 1984 GAO Honduras opinion, Congress, recognizing the need for continued U.S. military involvement with the provision of certain limited humanitarian types of activities to developing nations, began passing legislation in the late 1980s intended to permit humanitarian activities by the military. The legislation resulted in Title 10 authorized, and DoD funded, military programs intended to complement the goals and objectives of the State Department's development assistance programs.

Before discussing the military programs, however, we should understand the policy underlying these programs, and possible trade-offs involved. Why is the Department of Defense involved in what looks like Department of State business that is not directly related to national security? Many civilian policy makers and military commanders argue that there exists a nexus between providing basic human needs and national security. They believe that: 1) nations that fail to provide basic human needs often fail to maintain the support of their citizens; 2) insurgencies thrive in areas where the government can not or will not provide basic services; and 3) the provision of humanitarian assistance by the U.S. forces helps teach the proper role of the military in a democracy to developing countries. U.S. forces providing humanitarian services to the civilian population demonstrate to host nation forces that the military serves the civilian population.

The U.S. military also benefits from its participation in humanitarian activities. Such activities: 1) provide a method for introducing U.S. forces in areas where they may not otherwise have access; 2) reduce the number of permanent forward deployed troops; and 3) provide training opportunities that are impossible to duplicate in the U.S.

Legislative authorities: Military Humanitarian Operations

Humanitarian and Civic Assistance (HCA) 10 U.S.C. § 401.

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[11] *See* FAA § 493, 22 U.S.C. § 2292b and E.O. 12966, Sec. 3, 60 F.R. 36949 (July 14, 1995). *See also* E.O. 12163, section 1-102(a)(1), 44 F.R. 56673 (Sept. 29, 1979), *reprinted as amended in* 22 U.S.C.A. § 2381 (West Supp. 1996).

[12] *See generally,* E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[13] Operations Sea Angel and Strong Support were traditional Foreign Disaster Relief Operations where the affected Governments requested U.S. assistance. Operations Support Hope, Restore Hope, Provide Comfort presented additional challenges because they were largely non-permissive in nature. In the cases of the last three examples, the United Nations essentially conducted a humanitarian intervention.

The enactment of HCA legislation is a direct Congressional response to the 1984 GAO Honduras Opinion. Congress recognized the benefits of permitting U.S. armed forces to conduct limited HCA projects.

The typical sequence for the initiation and execution of HCA projects is as follows. The embassy country teams and the service components of the regional CINCs nominate HCA projects for their respective countries to the CINC having responsibility for that country. The CINC, usually at an annual HCA conference, develops an order of merit list. Proposed HCA projects that fall below the funding "cut line" may not be completed because the funds were unavailable. HCA funding comes directly from the Services to the CINCs. The money is Service O&M funds that are fenced off by the Services specifically for HCA. Each service is responsible for funding a particular CINC (e.g., Army: SOUTHCOM & EUCOM).

Congress imposed certain restrictions on the conduct of HCA by the U.S. military. HCA projects must be approved by the Secretary of State. The security interests of both the U.S. and the receiving nation must be promoted. The mission must serve the basic economic and social needs of the people involved. HCA must complement but not duplicate any other form of social or economic assistance. The aid may not be provided to any individual, group or organization engaged in military or paramilitary activity.

HCA funds are used to pay for expenses incurred as a "direct result" of the HCA activity. These expenses include: consumable materials, equipment leasing, supplies, and necessary services. Pursuant to DoDD 2205.2, *Humanitarian and Civic Assistance*, expenses as a "direct result" do not include costs associated with the military operations *which likely would have been incurred whether or not the HCA was provided*, such as: transportation, military personnel, petroleum oil and lubricants, and repair of U.S. government equipment. HCA expenditures are reported each year to Congress by country, type and amount.

The statute lists four kinds of activities that may be performed as traditional HCA:

- Medical, dental, and veterinary care provided in rural areas of a country;
- Construction of rudimentary surface transportation systems.
- Well drilling and construction of basic sanitation facilities.
- Rudimentary construction and repair of public facilities.

Legal issues that typically arise during the conduct of HCA projects include the following:

Furnishing and equipping newly constructed buildings. Engineer units that complete a construction project desire to leave behind a "turn-key" facility that is ready to be used. HCA authority, however, does not authorize the purchase of medical equipment for installing in a new building designed to be a clinic, nor does it authorize the purchase of school desks, blackboards, and books to be placed in a building designed to be a school house. The judge advocate could suggest alternative funding sources for the desired equipment. For example, USAID may have funds available to equip the new building. DoD may have excess non-lethal equipment it can transfer through USAID to the host nation. Private and non-governmental organizations often have funds or equipment available that could be used to furnish the building. Finally, U.S. military personnel, on a truly volunteer basis and on their personal time, could use scrap pieces of lumber to build desks, blackboards, etc., to furnish a building.

Donation of unused materials, supplies and minor equipment. Sometime the U.S. military unit may wish to leave behind small tools or excess construction materials or medical supplies that were not consumed during the HCA project. As a general rule, the U.S. military cannot leave tools, supplies or materials behind with the local authorities. The problem with leaving these items behind with the local authorities is that once the unit leaves, there is no longer a nexus to training. Leaving these items behind (in significant quantities) amounts to foreign aid which should be funded with State Department Title 22 funds under the FAA. If there were no way to economically or practically save the items for a follow-on HCA exercise, then they could be declared excess and disposed of through the normal procedures. Ultimately, USAID would take possession of the items and distribute

them to the local authorities. Remember: USAID is authorized to provide Developmental Assistance to foreign governments; military units are not and thus cannot provide the items directly to the local authorities.

Promotion of operational readiness skills. The issue that arises more frequently than any other is whether or not the specific operational readiness skills of the members of the unit participating are being promoted by the HCA project. The promotion of these skills is a statutory requirement. The judge advocate should ask: are the skills being utilized during the HCA project within the unit's METL? What is the ratio of U.S. participation relative to foreign military participation? Are they relying too heavily on foreign civilian contractor participation? DoDD 2205.2 provides additional guidance in this regard.

De minimis HCA. Sometimes, during the course of a combined exercise in a foreign country, an unexpected opportunity to perform minor humanitarian and civic assistance arises. For example, during the conduct of an infantry platoon level combined exercise, a young girl in the local village near the exercise site may require minor medical attention to set a broken bone. 10 U.S.C. § 401(c)(2) authorizes the military commander to permit the treatment of the child by the platoon's assigned doctor or medic. The costs associated with this treatment would likely be minimal and would be paid for from the unit's O&M funds. This kind of activity is referred to as de minimis HCA. Only HCA amounting to "minimal expenditures" may be provided. Although minimal expenditures are not defined in the statutes, DoD Directive 2205.2 provides guidance in determining what minimal means.[14]

Demining. Title 10 U.S. Code § 401(e)(5)

The HCA statute also provides for activities relating to the furnishing of education, training, and technical assistance with respect to the detection and clearance of landmines. This activity is contained within the HCA statute, but it is not restricted by the rules pertaining to traditional HCA. In fact, many of the rules pertaining to demining are completely contrary to those pertaining to traditional HCA. Thus, for purposes of our discussion, it is more logically consistent to categorize § 401 demining as a separate kind of activity rather than associating it with traditional HCA.

Some of the rules pertaining to demining follow. U.S. forces are not to engage in the physical detection, lifting, or destroying of landmines (unless it is part of a concurrent military operation other than HCA). Unlike traditional HCA activities, assistance with regard to demining must be provided to military or armed forces. Unlike HCA, equipment, services and supplies acquired for demining, including non-lethal, individual, or small-team landmine clearing equipment or supplies may be transferred to the foreign country.

Humanitarian Assistance, 10 U.S.C. § 2551.

Authorizes use of funds for transportation of humanitarian relief and for other humanitarian purposes worldwide. This authority is often used to transport U.S. Government donated goods to a country in need. (10 U.S.C. § 402 applies when relief supplies are supplied by non-governmental and private voluntary organizations, see below.) "Other humanitarian purposes worldwide" is not defined in the statute. Generally, if the contemplated activity falls within the parameters of HCA under 10 U.S.C. § 401, then the HCA authority should be used. This section primarily allows more flexibility in emergency situations. HCA generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants. Section 2551 does not require the promotion of operational readiness skills of the U.S. military participants.

Excess non-lethal supplies: humanitarian relief, 10 U.S.C. § 2547.

Sometimes the provision of troops and transportation alone is not enough. This statute allows DoD to provide excess non-lethal supplies for humanitarian relief. Excess property may include any property except: real property, weapons, ammunition, and any other equipment or material that is designed to inflict bodily

[14] See "Definitions" where DoD explains that a commander is to use reasonable judgment in light of the overall cost of the operation in which the expenditure is incurred, taking into account the amount of time involved and considering congressional intent. DoD then gives two examples of De Minimis. (1) A unit's doctor examining villagers for a few hours, administering several shots and issuing some medicine but not a deployment of a medical team providing mass inoculations. (2) Opening an access road through trees and underbrush for several hundred yards, but not asphalting a roadway.

harm or death. Excess property is that property which is in the Defense Reutilization and Management Office (DRMO) channels. If the required property is in the excess property inventory, it is transferred to USAID, as agent for the Department of State, for distribution to the target nation. This statute does not contain the authority to transport the items, though it may be provided under authority of 10 U.S.C. § 2551, above.

Transportation of humanitarian relief supplies to foreign countries, 10 U.S.C. § 402.

This statute authorizes the transportation of non-governmental privately donated relief supplies. It is administered by DoS and DSCA. The relief supplies are transported on a Space-A basis under certain conditions: 1) supplies must be in useable condition; 2) supplies must be suitable for humanitarian purposes, and 3) adequate arrangements must have been made for their distribution in country. Once in-country, the supplies may be distributed by any U.S. government agency, a foreign government agency, an international organization, or a private nonprofit organization. In light of the fact that the supplies are transported on a Space-A basis, no separate funding is necessary. However, reports must be submitted to Congress.

Foreign Disaster Assistance, *10 U.S.C. § 404.*

In consultation with the Secretary of State, USAID is the lead agency for foreign disaster relief, with the primary source of funding being the International Disaster Assistance Funds, 22 U.S.C. § 2292-2292k.

DoD has limited authority to engage in disaster assistance. The President may direct DoD through the Secretary of Defense to respond to manmade or natural disasters. DoD's participation must be necessary to "save lives." Assistance may include: transportation, supplies, services, and equipment. The President must notify Congress within 48 hours after the commencement of the assistance. The notice must include: The manmade or natural disaster involved, the threat to human lives presented, the U.S. military personnel and material resources involved or expected to be involved, disaster relief being provided by other nations or organizations, and the expected duration of the assistance activities. Because of the authority provided in 10 U.S.C. § 2551, this authority is rarely used.

CINC Initiative Funds, *10 U.S.C. § 166a.*

This authority provides the CINCs with a great deal of legal flexibility to conduct humanitarian operations and activities. The statute specifically lists "Humanitarian and civil assistance" as an authorized activity.

Funding sources: Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA)

In an attempt to bring some order to the scattered authorities and funding sources for military humanitarian programs, Congress began appropriating funds into an account labeled "Overseas Humanitarian, Disaster, and Civic Assistance" (OHDACA) account. OHDACA funds are generally used to pay for operations and activities which are authorized by Title 10 § 2551, Humanitarian Assistance, and Demining under 10 U.S.C. § 401. Even though the law specifically lists HCA and Disaster Relief as appropriate uses for the fund, the actual practice is that OHDACA funds are used to pay for § 2551 authorized activities. "Traditional" HCA (i.e., all activities other than Demining) are separately funded.

CONCLUSION

Judge advocates must ensure that the military's participation in a Title 22 foreign assistance activity or in a Title 10 military cooperation or humanitarian operation accomplishes the commander's intent and complies with U.S. fiscal law, regulations, and policy.

Necessity For the Judge Advocate to Get It Right

Military commanders and staffs often plan for complex, multi-faceted, joint and combined operations, exercises and activities overseas. Not only do foreign allies participate in these activities, but so too do other U.S. government agencies, international non-governmental organizations, U.S. Guard and Reserve components. Not

surprisingly, these operations, exercises, and activities are conducted under the bright light of the U.S. and international press, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Congress will often have an interest in the location, participants, scope, and duration of the activity. Few operations the U.S. military conducts overseas escape Congressional interest. Thus, it is imperative that the commander and his or her staff be fully aware of, and appreciate the significance of, the legal basis for the conduct of the operation, exercise, or activity which benefits a foreign nation.

Judge advocates bear the primary responsibility for ensuring that all players involved, but especially the U.S. commander and his or her staff, understand and appreciate the legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error and embarrassment for the command in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the Anti-deficiency Act, and possible reprimands or criminal sanctions for the responsible commanders and officials.

How the Judge Advocate Can Get It Right—Early Judge Advocate Involvement.

Judge advocates must be part of the planning team from the inception of the concept, through all planning meetings, through execution of the operation or activity. It is too late for the judge advocate to review the operations plan the week or even the month before the scheduled event. Funding, manpower, logistics, transportation, and diplomatic decisions have long been made and actions, based on those decisions, have already been executed weeks in advance of the activity.

In short, the judge advocate must understand the statutory, regulatory and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the judge advocate must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The judge advocate must then ensure that the commander complies with such authorities.